The Iowa Public Information Board
And
Open Meetings and Records Laws

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v. **Issue orders enforcing Chapter 21 and Chapter 22**, including applying penalties set forth in those chapters as well "imposing any other appropriate remedies calculated to declare, terminate, or remediate any violation of those chapters"

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a. **Most problems stem from a lack of knowledge of legal requirements**

b. **Board seeks to provide information and training** that will enable public officials to perform their duties under Chapters 21 and 22

c. **We are establishing and nurturing existing relationships among entities that already do training**

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e. **Confidence that flows from education and training will result in better public service and citizen participation**

HOT TOPICS

MEETINGS – IOWA CODE CHAPTER 21

<u>It all starts here – what is a meeting?</u>

Iowa Code section 21.2(2) defines the meaning of "meeting".

> 2. "Meeting" means **a gathering in person or by electronic means**, **formal or informal, of a majority of the members of a governmental body** where there **is deliberation or action upon any matter within the scope of the governmental body's policy-making duties**. Meetings **shall not include a gathering** of members of a governmental body **for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter**. (Emphasis is added throughout by bold type and underlining.)

Note that a majority of the members of a governmental body constitutes a quorum. The quorum is determined by the total official membership of the body. If there are two vacancies in a five member body, three members are still required for a quorum.

If a quorum is present at the beginning of a meeting and members leave so that a quorum is no longer present, no official votes may be taken at that point.

Note also that section 21.2(2) acknowledges the First Amendment right to association and specifically protects the right of government officials to meet for social purposes — so long as (1) there is no discussion of policy and (2) no intent to avoid the purposes of the open meetings law. Section 21.2(2) likewise exempts members meeting for "ministerial" purposes. Examples of ministerial purposes: signing documents, civic events.

Courts have said that meeting to gather information, even if officials ask questions, is not "deliberation," so long as members don't discuss their opinions. According to a 1981 Attorney General's opinion, a gathering becomes an official meeting "if a majority of the members of a body engage in any discussion that focuses at all concretely on matters over which they may exercise judgment or discretion." Obviously, it is important for officials to be cautious. It is also important for government officials to keep in mind the stated purpose of the open meetings law: to assure that the "basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people. Ambiguity . . . should be resolved in favor of openness." (Ch. 21.1) This is especially true when the meeting involves an issue in which there is a high degree of public interest.

Meeting Notice, Tentative Agenda and Reconvened Meetings.

Iowa Code section 21.4 provides for public notice of meetings:

> 1. **Except as provided in subsection 3, a governmental body shall give notice of the time, date, and place of each meeting including a reconvened meeting of the governmental body, and the tentative agenda of the meeting, in a manner reasonably calculated to**

apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body **and posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body holding the meeting**, or if no such office exists, at the building in which the meeting is to be held.

2. a. **Notice** conforming with all of the requirements of subsection 1 of this section **shall be given at least twenty-four hours prior to the commencement of any meeting** of a governmental body **unless for good cause such notice is impossible or impractical**, in which case as much notice as is reasonably possible shall be given. **Each meeting shall be held at a place reasonably accessible to the public, and at a time reasonably convenient** to the public, unless for good cause such a place or time is impossible or impractical. Special access to the meeting may be granted to persons with disabilities.

b. **When it is necessary to hold a meeting on less than twenty-four hours' notice, or at a place that is not reasonably accessible to the public, or at a time that is not reasonably convenient to the public, the nature of the good cause justifying that departure from the normal requirements shall be stated in the minutes**.

3. **Subsection 1 does not apply to any of the following:**

a. A **meeting reconvened within four hours of the start of its recess, where an announcement of the time, date, and place of the reconvened meeting is made** at the original meeting in open session **and recorded in the minutes** of the meeting **and there is no change in the agenda**.

b. **A meeting held by a formally constituted subunit of a parent governmental body during a lawful meeting of the parent governmental body or during a recess** in that meeting **of up to four**

hours, or a meeting of that subunit immediately following the meeting of the parent governmental body, if the meeting of that subunit is publicly announced in open session at the parent meeting and the subject of the meeting reasonably coincides with the subjects discussed or acted upon by the parent governmental body.

4. **If another section of the Code requires a manner of giving specific notice of a meeting, hearing, or an intent to take action by a governmental body, compliance with that section shall constitute compliance with the notice requirements of this section.**

Best Practice: Avoid using agenda items like "Old Business" or "New Business" without listing specific items. They are fine as headings, but they are not really agenda items. At least twenty-four hour notice is legally required. Don't forget that the statute also requires that agendas must be written "in a manner reasonably calculated to apprise the public of that information." This has been interpreted by the Iowa Supreme Court to require that "the notice sufficiently apprised the public and gave full opportunity for public knowledge and participation." *KCOB/KLVN, Inc. v. Jasper County Bd. of Sup'rs*, 473 N.W.2d 171, 173 (Iowa 1971).

<u>What if a meeting agenda is posted and advertised in a newspaper and something comes up? Can a new a new agenda with a new item be posted if it is more than twenty-four hours before the meeting?</u>

In order to comply with Ch. 21.4, the agenda just needs to be posted, in a prominent place designated for that purpose, at least twenty-four hours before the beginning of the meeting. So a governmental body could take up the new item at its meeting, even if a different agenda was published in the paper, so long as the official agenda posted twenty-four hours in advance of the meeting included that new item. Whether it should is another matter.

<u>What if a new item comes up too late for inclusion on an agenda?</u>

The Iowa Supreme Court has said that a tentative agenda can be subject to change. A government body can discuss and take action on last-minute

EMERGENCY items without violating the law. Emergencies are defined as items that have to be acted on immediately and can't wait until a meeting for which legal notice is given. However, the court in *KCOB/KLVN* also said that "if action can be reasonably deferred to a later meeting, this should be done." 473 N.W.2d at 174.

When are advisory committees covered by the open meetings law?

The best approach from a legal, practical and public policy standpoint is to always consider advisory committees to be covered. It makes no difference what they are called. If they are created by a governmental body in the exercise of its executive authority "to develop and make recommendations on public policy issues," they are covered by definition as governmental bodies. Section 21.2(2) includes this definition of a governmental body:

> h. An advisory board, advisory commission, advisory committee, task force, or other body created by statute or executive order of this state or created by an executive order of a political subdivision of this state to develop and make recommendations on public policy issues.

While Iowa courts have not yet definitively answered this question, they have given general guidance. The basic idea is if an advisory group makes recommendations to a governmental body, then the advisory group is likely covered by the open meetings law. On the other hand, if the advisory group only provides objective factual information (without any corresponding advice or recommendations) to the governmental body, then the advisory group is probably not subject to the open meetings law. The challenge comes in determining at what point the "information" provided by an advisory group crosses the line from "fact-finding" to "advice" giving. If an advisory group gets too close to the line between "information" and "advice," it is likely subject to the open meetings law.

Best Practice: Require advisory groups to comply with open meetings law. Why take the risk of "mission creep" or misunderstanding of the charter for such a group.

Note that governmental bodies that appoint members of government bodies, including advisory committees, have a statutory (section 21.10) duty to provide those members with information about the open meetings law and open records law.

Iowa Code section 21.8 provides for electronic meetings:

> 1. A governmental body may conduct a meeting by electronic means **only in circumstances where such a meeting in person is impossible or impractical** and **only if the governmental body complies with all of the following:**
>
> a. The governmental body **provides public access** to the conversation of the meeting to the extent reasonably possible.
>
> b. The governmental body complies with section 21.4 (meeting notice requirements). For the purpose of this paragraph, **the place of the meeting is the place from which the communication originates or where public access is provided** to the conversation. (Emphasis and parenthetical statement added.)
>
> c. **Minutes are kept of the meeting**. The minutes **shall include a statement explaining why a meeting in person was impossible or impractical.**
>
> 2. A meeting conducted in compliance with this section shall not be considered in violation of this chapter.
>
> 3. A meeting by electronic means **may be conducted without complying with paragraph "a" of subsection 1** (public access) if conducted in accordance with all of the requirements for a **closed session** contained in section 21.5 (closed sessions). (Emphasis and parenthetical statements added.)

Best Practice: Avoid electronic closed meetings and try to provide public access regardless. If action results, it has to be taken, with some exceptions, in open session.

Closed meetings generally, Iowa Code section 21.5

21.5 Closed session.

1. A governmental body may hold a closed session only by **affirmative public vote of either two-thirds of the members of the body or all of the members present** at the meeting. A governmental body **may hold a closed session only to the extent a closed session is necessary for any of the following reasons**:

a. To review or discuss records which are required or authorized by state or federal law to be kept confidential or to be kept confidential as a condition for that governmental body's possession or continued receipt of federal funds.

b. To discuss application for letters patent.

c. To discuss strategy with counsel in matters that are **presently in litigation or where litigation is imminent** where its **disclosure would be likely to prejudice or disadvantage** the position of the governmental body in that litigation.

d. To discuss the contents of a licensing examination or whether to initiate licensee disciplinary investigations or proceedings if the governmental body is a licensing or examining board.

e. To discuss whether to conduct a hearing or to conduct hearings to suspend or expel a student, unless an open session is requested by the student or a parent or guardian of the student if the student is a minor.

f. To discuss the decision to be rendered in a contested case conducted according to the provisions of chapter 17A.

g. To **avoid disclosure of specific law enforcement matters**, such as current or proposed investigations, inspection or auditing techniques or schedules, **which if disclosed would enable law violators to avoid detection**.

h. **To avoid disclosure of specific law enforcement matters**, such as allowable tolerances or criteria for the selection, prosecution, or settlement of cases, **which if disclosed would facilitate disregard of requirements imposed by law**.

i. To **evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered** when **necessary to prevent needless and irreparable injury to that individual's reputation** and **that individual requests a closed session**.

j. To **discuss the purchase or sale of particular real estate only where premature disclosure could be reasonably expected to increase the price the governmental body would have to pay for that property or reduce the price the governmental body would receive** for that property. **The minutes and the audio recording of a session closed under this paragraph shall be available for public examination when the transaction discussed is completed**.

k. To discuss information contained in records in the custody of a governmental body that are **confidential records pursuant to section 22.7, subsection 50**. (Security procedures, assessments of vulnerability, security passwords, etc.)

l. To discuss patient care quality and process improvement initiatives in a meeting of a public hospital or to discuss marketing and pricing strategies or similar proprietary information in a meeting of a public hospital, where public disclosure of such information would harm such a hospital's competitive position when no public purpose would be served by public disclosure. The minutes and the audio recording

of a closed session under this paragraph shall be available for public inspection when the public disclosure would no longer harm the hospital's competitive position. For purposes of this paragraph, "public hospital" means a hospital licensed pursuant to chapter 135B and governed pursuant to chapter 145A, 226, 347, 347A, or 392. This paragraph does not apply to the information required to be disclosed pursuant to section 347.13, subsection 11, or to any discussions relating to terms or conditions of employment, including but not limited to compensation of an officer or employee or group of officers or employees.

2. **The vote of each member on the question of holding the closed session and the reason for holding the closed session by reference to a specific exemption under this section shall be announced publicly at the open session and entered in the minutes**. A governmental body **shall not discuss any business during a closed session which does not directly relate to the specific reason** announced as justification for the closed session.

3. **Final action by any governmental body on any matter shall be taken in an open session unless some other provision of the Code expressly permits such actions to be taken in closed session**.

4**. A governmental body shall keep detailed minutes of all discussion, persons present, and action occurring at a closed session, and shall also audio record all of the closed session**. The **detailed minutes and audio recording of a closed session shall be sealed and shall not be public records** open to public inspection. **However**, **upon order of the court** in an action to enforce this chapter, **the detailed minutes and audio recording shall be unsealed and examined by the court** in camera. **The court shall then determine what part, if any, of the minutes should be disclosed to the party seeking enforcement of this chapter for use in that enforcement proceeding.** In determining whether any portion of the

minutes or recording shall be disclosed to such a party for this purpose, **the court shall weigh the prejudicial effects to the public interest of the disclosure of any portion of the minutes or recording in question, against its probative value as evidence** in an enforcement proceeding. After such a determination, **the court may permit inspection and use of all or portions of the detailed minutes and audio recording by the party seeking enforcement** of this chapter. A governmental body shall **keep the detailed minutes and audio recording of any closed session for a period of at least one year** from the date of that meeting, except as otherwise required by law.

5. **Nothing in this section requires a governmental body to hold a closed session to discuss or act upon any matter**. (Emphasis added.)

Closed meetings to discuss personnel issues 21.5(i) and 21.5 (a) & (c)

Iowa Code subsection 21.5(1)(i) sets forth the specific procedures applicable to evaluation of professional competency by a governmental body in closed session. This subsection reads:

> i. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.

For a session to be closed, **ALL** of the following must occur:

1. The discussion must involve an evaluation of the professional competency of an individual.

2. The discussion must involve consideration of the appointment, hiring, performance, or discharge of the individual.

3. The discussion must be such that if conducted during an open meeting it would cause needless and irreparable injury to that person's reputation AND

4. The individual must request the closed session.

There is no statutory requirement that the subject individual must be allowed into the closed session. There is also no statutory provision that would bar attendance at the invitation of the governmental body.

While other subsections of 21.5 could be used to allow a closed meeting where there is discussion that involves a named individual who is an employee or a potential hire, a discussion that involves consideration of items one through three enumerated above must not occur in a closed meeting unless item four is also satisfied.

Code subsection 21.5(1)(a) allows a closed session to review or discuss records which are required or authorized by state or federal law to be kept confidential. The open meetings law, Code chapter 21, does not contain a definition or listing of records that would qualify. Section 22.7 of the open records law lists 67 records or types of records authorized to be kept confidential. An example relating to your inquiry is subsection 22.7(11). It provides that 'personal information' in confidential personnel records shall be kept confidential. There is no definition of 'personal information', but there is a listing of items that may not be kept confidential.

Other statutory definitions for the term 'personal information' include name, address and statistical data (Code chapter 421A – Tax return confidentiality) and name, address, date of birth, telephone number, driver's license number, employer/employee identification numbers, bank information, genetic information, fingerprints and credit card information (Code chapters 715A and 715C of the Criminal Code, dealing with identity theft).

Certainly there could conceivably be an occasion for discussing a confidential public record involving a specifically identified employee or potential hire that would not fall under the purview of subsection 21.5(1)(i).

However, **Code subsection 21.5(1)(i) provides the exclusive process for the evaluation of the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered. The application of**

subsection 21.5(1)(i) cannot be avoided under the guise of a confidential record review or discussion during a closed session conducted pursuant to subsection 21.5(1)(a).

Code subsection 21.5(1)(a) is a general provision. Application of Code section 4.7 requires that the specific provisions of Code subsection 21.5(1)(i) govern the activity specifically addressed.

Best Practices.

1. Notify a person of the fact that an evaluation of their professional competence will occur in an open meeting of the governmental body at a certain time and place.

2. Advise the person that they may request that the evaluation be done in a closed session if they have reason to believe a closed session is necessary to prevent needless and irreparable injury to their reputation.

3. Ask the person to notify the governmental body in advance of the meeting that they request a closed meeting. When appropriate, it may be useful to consult with the person about whether there is actually information expected to be discussed that would cause "needless and irreparable injury" to their reputation.

4. If the governmental body has reason to believe there is no risk of "needless and irreparable" injury to the person's reputation involved, they should not honor the request or, if they do honor it, they should adjourn the closed session and go into open session when it becomes obvious there is no such risk. I did not find specific guidance as to what would constitute "needless and irreparable" injury, but I believe it would require more than just a routine discussion of areas for improvement.

Note: While paragraphs 2 and 3 above are recommended "best practices," they are not required by law. The statute could be interpreted by the courts to require a notification as recommended in paragraph 1. Application of existing Iowa

Supreme Court opinions leads to the conclusion that the first sentence of paragraph 4 states a legal requirement.

Can an email exchange result in an illegal meeting? What about use of a social medium?

Email and social media afford opportunity to inadvertently create an illegal meeting. When members of a governmental body gather in sufficient numbers (a majority) in an Internet chat room and deliberate upon any matter within their official purview, they are in a meeting. The communication has almost the same simultaneity as an in-person meeting. Facebook-kinds of social media, are not quite as simultaneous, but could be close enough to ruled a meeting in the right circumstance. The use of the "Reply All" feature in email has a lesser degree of simultaneity, but the potential exists. Some on the enforcement side of things think that Reply All is always a violation when there is a quorum and deliberation occurs. I certainly agree if the communication has a substantial degree of simultaneity, such as would result from the use of a pre-arranged time of participation, an illegal meeting would result. The Supreme Court of Iowa discussed, but did not adopt, an "informal gathering" theory in the 1980 case of *Telegraph Herald v. City of Dubuque*, 297 N.W.2d 529, 534. The court observed that the theory "ignores the legislature's apparent intent that temporal proximity exist among members of the government body." It is a new day and a new court and we advise against such practices.

Best Practice: don't set yourself up to be the test case for what constitutes adequate "temporal proximity" in the modern age of electronic communications. Also, remember that you are creating a public record transcript anytime you engage in these kinds of communications to conduct public business.

May the public use cameras or recording devices at public meetings?

Yes, Iowa Code section 21.7 provides:

> **The public may use cameras or recording devices at any open session**. **Nothing in this chapter shall prevent a governmental body from making and enforcing reasonable rules for the conduct of its**

> **meetings** to assure those meetings are orderly, and free from interference or interruption by spectators. (Emphasis added.)

There is no need to tolerate unreasonable intrusion on the conduct of a meeting by a spectator, regardless of whether armed with a camera or recording device.

Note that there is no legal requirement that a governmental body allow public comment at its meeting. However, it is of course good public policy ensure citizens have opportunity for public input into the decision-making process. Many provide for a public comment period on their agendas. Successful public officials make themselves available for informal input other than in meetings.

PUBLIC RECORDS – IOWA CODE CHAPTER 22

Best Practice. Let's start with a tip. If you are a record requestor, communicate with the person handling your request. We sometimes get complaints the day after a request has been filed! Call them before calling us! If you are a custodian processing a records request let the requestor know if there is likely to be delay – and be sure to quote the anticipated cost up front. And collect that cost in advance as appropriate. If there is delay that was not anticipated, let the requestor know and explain why.

<u>What is a public record?</u>

The all-inclusive definition is Iowa Code section 22.1(3):

> 3. a. As used in this chapter, **"public records" includes all records**, documents, tape, or other information, stored or preserved in any medium, **of or belonging to this state or any county, city, township, school corporation, political subdivision**, nonprofit corporation other than a fair conducting a fair event as provided in chapter 174, whose facilities or indebtedness are supported in whole or in part with property tax revenue and which is licensed to conduct pari-mutuel wagering pursuant to chapter 99D, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

> b. "Public records" also includes all records relating to the investment of public funds including but not limited to investment policies, instructions, trading orders, or contracts, whether in the custody of the public body responsible for the public funds or a fiduciary or other third party.

How long must public records be retained?

Iowa Code chapter 305 provides for the development of public records retention rules applicable to state entities. They are not applicable to local government entities. Chapter 22 does not address record retention. However, several Iowa Code Chapters have retention requirements that apply to certain records.

How long does a custodian have in which to respond to a records request?

Chapter 22 is silent as to the time for response to a records request. The time to locate a record can vary considerably depending on the specificity of the request, the number of potentially responsive documents, the age of the documents, the location of the documents and whether stored electronically. The large number of variable factors affecting response time makes it difficult, and probably unwise, to establish hard and fast objective standards. The statute was adopted more than forty years ago. Today's electronic records environment adds to the complexity of this issue.

The only specific response time standard established by the statute addresses good-faith reasonable delay incurred in order to determine whether a document is confidential. Iowa Code subsection 22.8(4) addresses good faith reasonable delay when there is a question as to whether a record is subject to release. It includes this statement of an acceptable reason for delay:

> d. To determine whether a confidential record should be available for inspection and copying to the person requesting the right to do so. A reasonable delay for this purpose shall not exceed twenty calendar days and ordinarily should not exceed ten business days.

While the Code states a delay under Iowa Code subsection 22.8(4)(d) shall not exceed twenty calendar days, the Iowa Supreme Court does not view this as an absolute deadline:

> Open Records Act provision, stating that a reasonable delay for the purpose of determining whether a confidential record should be available for inspection and copying to the person requesting the right to do so shall not exceed 20 calendar days, does not impose an absolute 20-day deadline on a government entity to find and produce requested public records, no matter how voluminous the request; rather, it imposes an outside deadline for the government entity to make the particular determination mentioned. *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013).

While there is no objective test established in Iowa law, application of subjective judgments made by the Supreme Court in the *Horsfield* case resulted in overruling the trial court decision. The Supreme Court found that the City violated the Open Records Law when it did not produce 617 pages of records in approximately 70 days.

According to an Iowa Attorney General Sunshine Advisory Opinion from August 2005, "Delay is never justified simply for the convenience of the governmental body, but delay will not violate the law if it is in good faith or reasonable."

The Court's opinion in *Horsfield* lists several considerations for determining if a delay is reasonable:

> Under this interpretation, practical considerations can enter into the time required for responding to an open records request, including "the size or nature of the request." But the records must be provided promptly, unless the size or nature of the request makes that infeasible. 834 N.W.2d at 461.

The IPIB prosecuted a case in August, 2014, in which an administrative law judge found a 94 day delay in responding to a records request which resulted in the

production 355 pages of documents constituted a knowing violation of Iowa Code section 22.2.

May the custodian of a public record advise the subject of a public record of the fact that a request has been made to inspect and copy that record prior to its release?

Section 22.7 of the Open Records Law establishes exceptions to the general rule of openness. It recognizes that there are privacy rights and business matters at stake in many instances which establish valid reasons for holding public records in a confidential status in certain situations. There are also specific provisions in other Code Chapters that may apply to overcome the general statement of openness in Chapter 22.

Iowa Code section 22.8 establishes a right to seek to enjoin the examination and copying of a public record. The right is for the benefit of a lawful custodian of a government record, another government body or a person who would be aggrieved or adversely affected by the examination and copying of a record.

Although Chapter 22 does not specifically impose an obligation of a custodian of a public record to advise a person who might be aggrieved or adversely affected by the request for a public record, to not do so would in most cases make the right meaningless. There is no prohibition against such a practice. If the lawful custodian does not notify the subject of the record, how would the aggrieved or adversely affected person know to seek an injunction?

There are many situations where the custodian of a record may recognize a need to inform the subject of a record of the fact that the request for examination and copying of the record has been made. The custodian may not be in a position to determine whether the documents contain trade secret information, confidential business processes or personal information that could lead to harm.

Certainly the process contemplated in section 22.8 assumes that the process will be applied in good faith. It directly speaks to that requirement in paragraph 4 which begins with the statement: “Good-faith, reasonable delay by a lawful custodian is . . . not a violation . . . .”

Electronic records and private devises.

If an email, a report, or other document relating to government business is composed, received or stored on my personally owned electronic devise, is that a public record under Chapter 22?

Most likely, yes. If a government official or employee uses privately owned electronic devices or services, such as cell phones, computers, email accounts, smart phones, or such to conduct official government business, then the record generated is a public record.

What governs the issue is the content of the message. If it concerns public business relating to public duties of an official or employee, then it is a public record. Recent years have shown a rapid explosion in electronic device ownership, making it easy to start a project at work, fine tune it at home, email drafts to colleagues and others, refine it on the work computer, carry it around the world on a flash drive or store it indefinitely 'in a cloud.' Because of this ease of portability and expansion of the work site, the term "public records" no longer refers to a document in a paper file in a drawer in an office.

This issue has been addressed in Iowa in a limited manner. Iowa Code Section 22.1 includes "all records, documents, tape or other information, stored or preserved in any medium" in the definition of public records. Subsection 22.2(2) states that a governmental body cannot prevent access to a public record by contracting with a nongovernmental body (such as a cloud storage provider or service provider).

Section 22.3A addresses public records and data processing software. The cumulative effect of these statutes is that a public record does not lose its public status by being retained on a privately owned electronic device.

The Iowa Supreme Court, in a 1967, pre-email decision, addressed the idea that you must look at the contents of the document or communication to determine whether it is a public record: "It is the nature and purpose of the document, not the place where it is kept, which determines its status", *Linder v. Eckard*, 152 N.W.2d 833, 835 (Iowa 1967).

To allow a governmental body to avoid public records disclosure by simply requiring that officers or employees use their privately owned electronic devices would be to completely thwart the transparency goals of Chapter 22.

Comingling public communications and reports with private communications on a privately owned electronic device can create difficulty in responding to an open records request. Some private communications may arguably be withheld as not being a public record or as a confidential public record under Iowa Code Section 22.7. First and foremost, however, the public business communications are public records, and the custodian must review all records on a device to determine whether they are within a request for examination and copying to justify any denial of release.

Best Practices: Electronic communications relating to official duties are subject to review and disclosure, even if written, drafted, communicated and/or stored on a privately purchased and owned electronic devise or email service. If this practice is going to occur anyway, use of a dedicated folder or flash drive should be considered. It is an especially bad practice when public officials text each other or pass notes at a public meeting. Those messages and notes are public records and can be required to be produced.

Preliminary Drafts 22.7(65).

The following is a general discussion of the provisions and an interpretation of Iowa Code section 22.7(65), the so-called preliminary draft provision. The staff has examined this issue and discussed it with board members. The staff has not taken this interpretation to the board for its adoption as an "official" interpretation. All recognize that the language is complex. Parts of that language lead to subjective evaluations that likely will be influenced by specific circumstances. Until experience is obtained with its application and various nuances addressed, it is only possible to give a literal interpretation as a starting point.

Obviously, determining whether a record is a 'draft' is not as simple as marking or stamping 'draft' on the document. There is one certainty: naming a record a draft does not make it a draft.

This provision was enacted in 2012 to address the dampening of creativity that could result from submission of a novel or unusual proposal. It was urged that subordinates should be able to submit ideas without fear of ridicule and decision-makers should not have to be concerned about creative ideas that never advance. Iowa Code section 22.7(65) states:

> Tentative, preliminary, draft, speculative, or research material, prior to its completion for the purpose for which it is intended and in a form prior to the form in which it is submitted for use or used in the actual formulation, recommendation, adoption, or execution of any official policy or action by a public official authorized to make such decisions for the governmental body or the government body. This subsection shall not apply to public records that are actually submitted for use or are used in the formulation, recommendation, adoption, or execution of any official policy or action of a governmental body or a government body by a public official authorized to adopt or execute official policy for the governmental body or the government body.

This exemption has limited application restricted to a specific class of public records that meet all of the following criteria:

1. They are tentative, preliminary, draft, speculative or research material;

2. They exist in a form prior to completion for their intended purpose;

3. They exist in a form prior to the form of the record that is submitted or used in the actual formulation, recommendation, adoption or execution of any official policy or action by a public official with authority to make such decisions; and

4. They must not have been submitted to or used by a public official authorized to adopt or execute official policy.

The applicability of paragraphs 1 through 3 rendering material confidential cannot be finally determined until there is a final decision made by a decision maker as contemplated by paragraph 3. Confidentiality is lost immediately when disqualified under paragraph 4

The first sentence of the quoted language establishes the affirmative qualifications that must be met in order to qualify as a "draft." The second portion states specific disqualifications that apply in stated circumstances. Taken together these qualifications and disqualifications establish the four criteria stated above.

The first criterion is obvious. The exemption only applies to draft material. The second criterion provides that only certain draft material is eligible for the exemption. It has to be material in a form different from and preliminary to the form of the completed product. The third criterion requires that an exempt record must exist in a form prior to the creation of the record submitted for use or used as an actual public policy statement promulgated by a public official with authority to make decisions related to the subject matter of the record. Finally, an exempt record must avoid having been submitted to or used by a public official with authority to make or execute official policy even it does not appear in the final draft. Or restated: an otherwise exempt record loses its exempt status merely by having been submitted to or used by a public official authorized to adopt or execute official policy. Even if the decision-maker rejects the submitted draft material or alters it to the extent that the submitted draft material becomes unrecognizable, the submitted record (draft material) is no longer exempt once it has been passed to the decision-maker.

Who is a decision maker? The determining factor under the exemption is whether the public official is authorized to make or execute the official policy for the government body related to the subject matter of the draft record. This will vary under the circumstances. There may be more than one decision-maker of the same rank in government body. A decision-maker need not be a high level public official. There are probably more low level decision-makers in a government organization than high-level decision-makers. The operation of

government involves numerous decisions made at all levels. Under the terms of the exemption, the decision-maker need not even actually make decisions since the exemption also refers to public officials who have authority to execute official policy. The sharing of draft materials with the public official who merely has the power to execute the public policy would terminate the confidentiality of an otherwise exempt draft document.

Material outside the scope of the exemption cannot be identified until a final decision is made or product produced unless the material has been submitted to a decision maker. Until one of the disqualifying events occurs, prospectively covered material is confidential. Once a disqualifying event occurs the material can be examined to see whether is remains confidential through application of paragraphs 1 through 3 above. Disqualifying events include submission of the material for use by a public official authorized to adopt or execute official policy (see paragraph 4 above) or actually used in the actual formulation of official policy or action (see paragraph 3 above).

A simple test is to examine the draft material and compare its contents to the contents of the final product. If an idea in the final draft appears in the potential tentative draft, the exemption is lost.

Another test is to determine when the draft material reached the hands of a decision maker or person who will execute the policy. In some entities that may be the person at the next desk or office. In others entities it may be a person the creator or preparer of the draft material has never personally met. The smaller the government entity, the less likely it is that the exemption would apply. In many small government entities, the decision maker or executive authority is only one step removed from the person preparing the draft material.

<u>Are employment applications confidential records?</u>

In *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988), the Iowa Supreme Court held that government bodies can make job applications confidential under 22.7(18), if the body could reasonably believe that those

persons would be discouraged from applying if applications were public. Section 22.7(18) states:

> 18**. Communications not required** by law, rule, procedure, or contract **that are made to a government body or to any of its employees by identified persons outside of government**, to **the extent that the government body** receiving those communications from such persons outside of government **could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination**. As used in this subsection, "persons outside of government" does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists. Notwithstanding this provision:
>
> a. **The communication is a public record to the extent that the person outside of government making that communication consents** to its treatment as a public record.
>
> b. **Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly indicating the identity** of the person outside of government making it or enabling others to ascertain the identity of that person.
>
> c. **Information contained in the communication is a public record to the extent that it indicates the date, time, specific location, and immediate facts and circumstances surrounding the occurrence of a crime or other illegal act, except** to the extent that its disclosure would plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person. In any action challenging the failure of the lawful custodian to disclose any particular information of the kind enumerated in this paragraph, **the burden of proof is on the lawful custodian to demonstrate that the**

disclosure of that information would jeopardize such an investigation or would pose such a clear and present danger.

What about personnel files?

Code subsection 22.7(11) specifies what information in the otherwise confidential personnel records of government officials, officers or employees must be considered public record:

The name and compensation of the individual, including any written agreement establishing terms of employment; pay and things of value conferred for services rendered; casualty, disability, life or health insurance benefits; other health or wellness benefits; vacation, holiday or sick leave; severance payments; retirement benefits; deferred compensation.

The time period the individual was employed by the government body.

The positions the person holds or held.

Resume information to include educational institutions attended and degrees conferred as well as the names of previous employers, positions held and dates of employment.

If a person is discharged for disciplinary reasons, this fact becomes public information once all appellate and contract remedies are exhausted.

And what about secret settlements!?

Settlements are governed by Code section 22.13. It states:

22.13 Settlements — government bodies.

When a government body reaches a final, binding, **written settlement agreement that resolves a legal dispute** claiming monetary damages, equitable relief, or a violation of a rule or statute, **the government body shall**, upon request and to the extent allowed under applicable law, **prepare a brief summary of the**

resolution of the dispute indicating the identity of the parties involved, the nature of the dispute, and the terms of the settlement, including any payments made by or on behalf of the government body and any actions to be taken by the government body. **A government body is not required to prepare a summary if the settlement agreement includes the information required to be included in the summary. The settlement agreement and any required summary shall be a public record.**

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